

#2556

signed 6-29-01

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

**In re:**

**DESIREE RIAS,**

**DEBTOR.**

**CASE NO. 99-40112-13  
CHAPTER 13**

**In re:**

**NATALIE NICOLE TIBBS,**

**DEBTOR.**

**CASE NO. 00-42759  
CHAPTER 13**

**In re:**

**LAFAELE PASELIO,  
RHONDA SUE PASELIO,**

**DEBTORS.**

**CASE NO. 00-41267-13  
CHAPTER 13**

**In re:**

**CATHERINE A. MOYLE,**

**DEBTOR.**

**CASE NO. 99-41926-13  
CHAPTER 13**

**In re:**

**APRIL M. WILLIAMS,**

**DEBTOR .**

**CASE NO. 00-41749-13  
CHAPTER 13**

**In re:**

**MARGO FRANCES PASSMORE,**

**DEBTOR.**

**CASE NO. 00-42064-13  
CHAPTER 13**

**In re:**

**ROGER DALE LAM,  
SHELLEY KAY LAM,**

**DEBTORS.**

**CASE NO. 00-41670-13  
CHAPTER 13**

**In re:**

**HAROLD DEAN ADKINS,  
ELIZABETH JEAN ADKINS,**

**DEBTORS.**

**CASE NO. 00-40984-13  
CHAPTER 13**

**In re:**

**BARBARA ANN WATERMAN,  
SHAWN CHRISTIAN WATERMAN,**

**DEBTORS.**

**CASE NO. 00-42390-13  
CHAPTER 13**

**In re:**

**KIMBERLY ANN LUCE,**

**DEBTOR.**

**CASE NO. 00-41691-13  
CHAPTER 13**

**In re:**

**RUSSELL A. GAYER,  
PATRICIA I. FREED,**

**DEBTORS.**

**CASE NO. 98-41695-7C  
CHAPTER 7**

### **MEMORANDUM OF DECISION**

These matters are before the Court on a creditor's motions for administrative expenses in each of the above-captioned cases. The creditor, Western Resources, Inc., d/b/a KPL ("Western"), appears by counsel Anne M. Kindling of Goodell, Stratton, Edwards & Palmer, L.L.P., Topeka,

Kansas. Chapter 13 Trustee Jan Hamilton (“the Trustee”) has objected to all the motions. The Court has reviewed the relevant materials and is now ready to rule.

### FACTS

The relevant facts in these cases are the same and are undisputed. Western provides electric and natural gas utility service to the debtors. The debtors all incurred postpetition utility bills with Western, but failed to pay at least some of the charges. The charges may have been incurred either before or after confirmation of the debtors’ chapter 13 plans, or both. All the debtors had plans confirmed, although the Gayer and Freed case was recently converted to chapter 7. In each case, Western has moved to have its postpetition utility charges allowed as an administrative expense pursuant to 11 U.S.C.A. §503(b). The Trustee objects that the charges do not qualify as administrative expenses, but can only be sought and allowed as provided in §1305.

### DISCUSSION AND CONCLUSIONS

Before directly addressing the question presented here, some background information about the operation of chapter 13 under this Court’s supervision should be helpful. So long as debtors with a confirmed plan remain in chapter 13 and complete their plan, Western would be paid in full whether its charges were allowed as an administrative expense under §503(b) or a postpetition claim under §1305. In some cases, Western might be paid earlier or later depending on the classification of its charges. The Court generally allows debtors to seek to add a creditor’s postpetition claim after notice to the creditor with opportunity to object so long as the debtors also increase their plan payments and earmark the increase to pay the claim. This method is permitted whether the claim is allowed as an administrative expense under §503(b) or simply a claim under §1305.

If the debtors fail to complete their plan, however, and their case is converted to chapter 7, the classification of Western's charges will make a difference. If allowed as an administrative expense, the charges would remain an administrative expense in the chapter 7 phase of the case, but would be subordinated to the administrative expenses of the chapter 7 phase. *See* §726(b). If allowed under §1305, the charges would be just another unsecured claim against the chapter 7 estate, paid only after all administrative expenses and pro rata with the other unsecured claims. In fact, most consumer chapter 7 bankruptcy estates in cases filed before this Court have no assets to be distributed to creditors. Some of those that do have assets will not have enough to pay any of the chapter 13 administrative expenses, and still fewer will pay anything on general unsecured claims. Whether the charges are allowed under §503(b) or §1305, they will be covered by the chapter 7 discharge, unless they are excepted under one of the provisions of §523(a) from the discharge. *See* §348(b) & §727(b); *In re Toms*, 229 B.R. 646, 652-56 (Bankr. E.D. Pa. 1999); 4 Keith M. Lundin, *Chapter 13 Bankruptcy*, 3d ed., §314.1 at 314-3 to -4 (2000).

The question remains, of course, whether an unpaid, postpetition utility bill incurred by an ordinary consumer debtor should be classified as an administrative expense or merely an unsecured postpetition claim. As usual, the Court believes it should begin with a review of the relevant provisions of the Bankruptcy Code. Section 503(b) provides in pertinent part: "After notice and a hearing, there shall be allowed administrative expenses . . . including— (1)(A) the actual, necessary costs and expenses of preserving the estate." Although §1327(b) provides that property of the estate vests in the debtor on confirmation, courts are authorized to, and this Court does, order otherwise, so that the bankruptcy estate survives confirmation, and the debtor could possibly incur debts after confirmation

that preserve the estate. Section 1305(a) provides in pertinent part: “A proof of claim may be filed by any entity that holds a claim against the debtor— . . . (2) that is a consumer debt, that arises after the date of the order for relief under this chapter, and that is for property or services necessary for the debtor’s performance under the plan.” These provisions indicate that the Court must determine whether electric and natural gas utility service is necessary to preserve the bankruptcy estate, or is only necessary for the debtor’s performance of the plan.

As pointed out by Western’s counsel, consumer debtors use its utility service: (1) to operate the various appliances in their residences, including for heating and cooling, and preserving and cooking their food, and (2) to provide themselves with modern conveniences such as lights and television. The Court believes, however, that the utility service is not necessary to preserve property of the estate, because none of the debtor’s property would necessarily be lost without it. So long as they have adequate warning that they will have to do without the service, debtors could prepare their residences to prevent damage from lack of heat in the winter, and otherwise protect their possessions. Furthermore, while the inconvenience of living without utility service might interfere with debtors’ ability to perform their plans and thus, indirectly harm their estates, if the Court were to conclude utility service is therefore necessary to preserve the estates, the Court would feel compelled to conclude that many other expenses, such as those for clothing, groceries, automobile repairs, and so on, are also necessary in a similar sense, though perhaps to differing degrees, to preserve their estates. Consequently, the Court is convinced that Western’s service does not directly preserve property of the estate, and so does not qualify as an administrative expense under §503(b).

On the other hand, the Court finds it easy to conclude that Western's utility service is necessary for debtors to perform their plans. Under the current American lifestyle, nearly everyone uses such service for maintaining comfortable temperatures in their residences, preserving and preparing their food, and running their lights, televisions, and other modern conveniences. In fact, the example of automobile repairs provides more support for the view that such items should be held to fall under §1305, not under §503(b). Some insight into Congress's intent appears in the legislative history to §1305: "Subsection (a) permits the filing of a proof of a claim against the debtor . . . that arises after the date of the filing of the petition for property or services that are necessary for the debtor's performance under the plan, such as auto repairs in order that the debtor will be able to get to work." H.R. Rep. No. 95-595 at 427-28 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6383. This indicates the kinds of postpetition expenses mentioned earlier were intended to be allowed under §1305. Clearly, in a consumer case, Western's service is necessary to the debtor's performance, and easily fits under §1305.

For these reasons, the Court must conclude that Western's motions for administrative expenses in these cases must be denied.

The foregoing constitutes Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment based on this ruling will be entered on a separate document as required by FRBP 9021 and FRCP 58.

Dated at Topeka, Kansas, this \_\_\_\_ day of June, 2001.

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JAMES A. PUSATERI  
CHIEF BANKRUPTCY JUDGE